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In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NO. 80-1832 AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NOS. 80-2170 AND 80-2171

BRIEF FOR APPELLANT-RESPONDENT IMMIGRATION AND NATURALIZATION SERVICE IN RESPONSE TO THE SUPPLEMENTAL BRIEFS ON REARGUMENT FOR THE UNITED STATES SENATE AND HOUSE OF REPRESENTATIVES

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1. The Senate and House of Representatives once again have wholly failed to overcome the fundamental defect of the legislative veto provision in Section 244(c) of the Immigration and Nationality Act: its inconsistency with the explicit and repeated commands in Article I, Sections 1, 7 and 8 of the Constitution that all actions of the Legislative Branch, before they may be given a legally binding effect outside that Branch, must be passed by both Houses of Congress and be approved by the President or repassed over his veto by two-thirds of each House.

We refer the Court to the discussion of the bicameralism and presentation requirements in our principal brief (INS Br. 15-43), which we will not repeat here. There we demonstrate: (i) that the text of Article I does not itself permit one House of Congress to take action that will bind a coordinate Branch or affect the rights and liabilities of the people (INS Br. 17-21); (ii) that the text of Article I also forecloses Congress from accomplishing what the Constitution itself does not permit simply by enacting a law authorizing one of its Houses to pass a resolution purporting to have a legally binding effect outside the Legislative Branch (INS Br. 21-26); (iii) that the purposes underlying the requirements of bicameral approval and presentation to the President strongly reinforce the conclusion, compelled by the text of Article I, that the one-House veto provision in Section 244(c) of the Act is unconstitutional (INS Br. 26-34); and (iv) that the unconstitutionality of Section 244(c) is further reinforced by the fact that in those situations in which the Framers intended to permit a departure from the requirements of bicameral action and presentation to the President, they expressly so provided in the Constitution itself (INS Br. 34-39).

Neither the Senate nor the House of Representatives has responded directly to these arguments. The Senate instead devotes the bulk of its Supplemental Brief (at 9-40) to a discussion of the evolution of legislative veto

devices since 1932, a discussion that has no relevance to the question of the constitutionality of such devices (see pages 13-20, *infra*). The House largely repeats the arguments made in its previous brief concerning the Necessary and Proper Clause, Congress' power over aliens, and what the House perceives to be threshold procedural issues, arguments we have answered in our principal brief. INS Br. 46-47, 51-52, 73-77.

With regard to the explicit procedural requirements in Article I of the Constitution for the exercise of powers by the Legislative Branch, the Senate simply asserts (Sen. Supp. Br. 4) that these requirements may be ignored in the case of a resolution passed by one House of Congress to veto action taken by an Officer of the United States in the administration of the laws because such a resolution is not "original legislation," but rather constitutes the exercise of authority conferred on that House by a previously enacted law. The House of Representatives likewise asserts (House Supp. Br. 4-10), without any discussion whatever of the constitutional provisions involved or the intent of the Framers underlying them, that the House of Representatives' passage of the resolution disapproving the grant of permanent resident status to Chadha was not subject to those requirements because it did not constitute "lawmaking."

As we show below, the effort by the Senate and House of Representatives to dismiss the application of the bicameralism and presentation requirements to legislative vetoes in this fashion not only is without affirmative support in the text and background of the pertinent constitutional provisions; it is directly contrary to that text and background. It is important as well to stress the breadth of the arguments advanced by the Senate and House of Representatives. Those arguments would validate every legislative veto provision, including omnibus legislation authorizing a one-House veto of every decision made by an Officer of the United States in the administration of the law. This attempt fundamentally to recast

the constitutional plan established by the Framers must be rejected.

a. Nothing in the text of Article I suggests that the provisions for bicameral approval and presentation to the President apply only when the end product of the legislative action is formally labeled a "law" or, in the Senate's new terminology, "original legislation." Article I, Section 1 and Section 8, Clause 1 vest *all* legislative powers in the "Congress," and therefore jointly in the Senate and House of Representatives that together comprise the Congress. The requirement of concurrent action by the two Houses in all situations except those in which the Constitution expressly provides otherwise thus is not dependent upon the form in which power is exercised by the Legislature or the label attached to the action.[1]

The Presentation Clauses likewise offer no textual support for the Senate and House of Representatives' argument. To be sure, Section 7, Clause 2 of Article I does use the word "Law," providing that "Every Bill which shall have passed the House of Representatives and the Senate, shall *before it becomes a Law*, be presented to the President of the United States * * *" (emphasis added). But Clause 3 of Article I, Section 7 does not use the word "Law." It provides in sweeping language that *"Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; *and before the Same shall take Effect*, shall be approved by him, or

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[1] The debates on what is now Article I, Section 1 indicate that the Framers specifically intended that Section to embody a bicameralism requirement for all legislative acts and to apply in all instances except those in which a particular function had been explicitly assigned by the Constitution to just one House, such as the ratification of a treaty. 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 196-197 (1974). See also *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425, 464 n.165 (D.C. Cir. 1982), appeals and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209; INS Br. 23 n.10.

being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill" (emphasis added). Thus, *no* order, resolution, or vote requiring concurrent action by the two Houses—*i.e.*, no measure by which Congress seeks to impose its will on a coordinate Branch or on the people, and which is therefore "legislative in its character and effect" (S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897))—can "take Effect" without the President's approval or repassage by two-thirds of each House over his veto, whether or not the measure will formally "become[] a Law" in the manner contemplated for the "Bills" mentioned in Clause 2. Accordingly, the text of the Presentation Clauses refutes the contention that those Clauses were lawfully avoided in this case on the premise that the resolution of disapproval passed by the House of Representatives was not conceived as a "law" or "original legislation."

b. The Senate and House of Representatives' argument for avoiding the bicameralism and presentation requirements also is flatly inconsistent with the purposes of the pertinent provisions of Article I. Those provisions were intended by the Framers to be fundamental checks against oppressive, improvident, or precipitate action by the Legislative Branch and encroachment by that Branch upon the Executive in whatever form that action might take. The Framers feared the propensity of unicameral legislative bodies to yield to sudden impulses, and thereby to threaten personal liberties and the stability of the social order, and they sought to protect against this propensity by the inclusion of "self-executing safeguard[s]"[2] that would ensure an opportunity for due deliberation by the second House of the Legislature and independent consideration by the President. See INS Br. 26-34.

The Senate and House of Representatives do not dispute our submission that the foregoing concerns underlie

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[2] *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976).

the requirements of bicameral action and presentation to the President.[3] Once this much is conceded, it follows a fortiori that the one-House legislative veto device is unconstitutional, for these purposes of the Framers apply equally to the passage of legislative veto resolutions.

The present case vividly illustrates the point. The resolution of disapproval was passed by the House of Representatives in haste at the close of the legislative session; its consideration therefore plainly would have benefited from the opportunity for due deliberation by the Senate and independent review by the President, after he received the advice of those responsible for administering the immigration laws. Moreover, a regime under which the Attorney General's granting of relief pursuant to a duly enacted law may be overturned on an ad hoc and standardless basis substantially undermines the stability of the laws intended by the Framers, directly implicates their fears of tyranny and arbitrary action by the Legislature, and encroaches upon the powers of the Executive in administering the Immigration and Nationality Act. It is inconceivable that the Framers nevertheless intended that the checks they fashioned against these eventualities could be ignored simply because the action in question does not purport to be "original legislation," but instead was authorized by a previously enacted law.[4]

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[3] Moreover, as the United States Court of Appeals for the District of Columbia Circuit observed in *Consumer Energy Council of America* v. *FERC*, *supra*, 673 F.2d at 464, the requirement of bicameral action also is a critical aspect of the Great Compromise, under which one House of Congress represents the people and the other the States. Although this aspect may not be implicated in the instant case, the possibility of a one-House legislative veto of administrative action on a question about which the people in the several States may have divergent views, such as the matters of energy pricing involved in the *FERC* case, underscores the importance of bicameral action.

[4] The Senate asserts (Sen. Supp. Br. 4) that the purposes of bicameral consideration and presentation to the President were sufficiently served in 1952, when the Immigration and Nationality

The requirements of bicameral approval and presentation to the President thus are properly viewed as formidable barriers standing between the Legislative Branch on the one hand and the coordinate Branches and the people on the other, such that compliance with those requirements is an "irreducibl[y] minimum"[5] prerequisite for the Legislature to work its will. In this respect, the limitations in Article I of the Constitution on the exercise of power by Congress are directly analogous to the limitation in Article III that the Judicial Branch may exercise power only in "Cases" or "Controversies" that are brought before it. The latter provision is an essential institutional limitation on the exercise of power by the Judicial Branch to affect individual interests and to invalidate the actions of a coordinate Branch. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476 (1982). The Executive Branch is comparably restrained, most prominently by the fact that, aside from the functions expressly or impliedly conferred on the President by the Constitution itself, the Executive may act only pursuant to or in the execution of a previously enacted law. See Article II, Section 3 (the President "shall take Care that the Laws be faithfully executed"); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587-588 (1952); Article I, Section 9, Clause 7 ("No Money

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Act, including Section 244(c)(2), was enacted over the President's veto (ch. 477, 66 Stat. 163, 216, 281-282). Thus, it contends that there was no need for the resolution passed by the House of Representatives 23 years later, disapproving the granting of permanent resident status to Chadha, to receive the concurrence of the Senate or to be presented to the President for his consideration. This contention is in error. The consideration by Congress and the President in 1952 of the mechanism in Section 244(c)(2) for granting permanent resident status did not serve to protect against arbitrary action by one House of Congress—the essence of the legislative tryanny the Framers feared—when that House considers whether a particular alien should become a permanent resident alien.

[5] *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Enforcement in this case of the constitutionally prescribed requirements of bicameralism and presentation to the President will assure adherence to these functional roles the Framers intended for the respective Branches of Government.

c. The argument by the Senate and House of Representatives reduces to the contention that the Article I requirements of bicameral approval and presentation to the President may be evaded or dispensed with by Congress—the very Branch whose powers were intended to be restrained—simply by the passage of so called "original legislation" that authorizes one House of Congress to pass a resolution having a legally binding effect. To state such an illogical proposition is sufficient to refute it. But in addition, the origins of Clause 3 of Article I, Section 7—which applies to "Every Order, Resolution or Vote" to which the concurrence of the two Houses is necessary—demonstrate that it was adopted for the specific purpose of foreclosing evasion of the presentation requirement by Congress through the passage of measures other than "Bills," such as "Resolutions, votes &c." See 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 301-302, 304-305 (1974); INS Br. 24-25. It would be directly inconsistent with this deliberately all-inclusive thrust of Article I, Section 7 to recognize an implied exception for the "resolution" of disapproval passed by the House of Representatives in this case.

The Senate attempts to avoid the force of this conclusion by contending (Sen. Supp. Br. 5-8) that despite the broad language of Clause 3 and its purpose to avoid evasion of the presentation requirement, that Clause applies only to "resolutions" for the enactment of "original legislation," not resolutions embodying legislative vetoes of Executive action. Even if this interpretation of the term "Resolution" in the Clause were correct, the resolution of disapproval in this case would come within the sweep of Clause 3 because it was adopted by a "Vote" of the House of Representatives and in substance consti-

tuted an "Order" to the Attorney General to deport an alien who had been found eligible under the law for permanent resident status.

The Senate points to nothing in the constitutional text or debates revealing an affirmative intent to exclude from the Presentation Clauses some resolutions that are legislative in their character and effect, such as the resolution of disapproval at issue here. Rather, the Senate relies on the *Report of the Committee of the Council of Censors*, published in 1784, discussing the experience under certain provisions of the Pennsylvania Constitution. Specifically, the Senate points out that in one portion of its report, the Council of Censors criticized the actions of the Pennsylvania General Assembly in avoiding a constitutional requirement that bills of a public nature be printed and lie over until the following session of the Assembly before adoption. The General Assembly accomplished this evasion through the passage of "resolves," secretly and immediately, that made or amended laws and appropriated the lands, goods and money of the Commonwealth. Sen. Supp. Br. 7. From this, the Senate contends that Madison's argument when proposing what is now Clause 3 of Article I, Section 7 that Clause 2 could be evaded by passage of "Resolutions" must be read to refer only to resolutions providing for the enactment of "original legislation." Sen. Supp. Br. 5-8.

Neither the Council of Censors' report nor Madison's remarks contain the slightest suggestion of the distinction the Senate posits. To the contrary, the Council's concerns and the Framers' references to them strongly confirm that the Presentation Clauses apply to all resolutions, including those embodying legislative vetoes of Executive action, that purport to have a legally binding effect on a coordinate Branch or affect the rights and liabilities of the people.

The express purposes of the publication and layover requirements discussed by the Council were to ensure that laws were "maturely considered" and to protect

against the "inconvenience of hasty determinations" (Pa. Const. § 15 (1776), quoted in Sen. Supp. Br. 5 n.4.) —purposes that the requirements of bicameral action and presentation to the President under the Federal Constitution also were designed to advance. In addition, Madison's discussion of this experience in Pennsylvania in *The Federalist* No. 48, cited by the Senate (Sen. Supp. Br. 7 & n.11), is part of a paper emphasizing the importance of protecting against improvidence and usurpation by the Legislative Branch, and he described the requirement in the Pennsylvania Constitution that bills be previously printed for the consideration of the people as one of the chief precautions provided in that Constitution "against improper acts of the legislature." *The Federalist* No. 48, quoted in Sen. Supp. Br. 8 n.11. Madison's discussion obviously undermines rather than supports the Senate's argument for avoiding another check against unwise legislative action, and especially for avoiding Clause 3 of Article I, Section 7, which Madison proposed for the very purpose of foreclosing evasion by Congress of the check furnished by the President's veto power.

In addition, the Senate fails to point out that the introductory pages of the Council of Censors' report contain an extensive criticism of the Pennsylvania General Assembly's practices that is directly applicable to the legislative veto device. The Council criticized the Assembly for acting by "summary resolutions" rather than raising a "superstructure of law, after mature deliberation, and clothed with the solemnities of enacting, which give weight and dignity, as well as public notoriety to the statute." *The Constitution of the Commonwealth of Pennsylvania * * * To Which Is Added A Report of the Committee To Enquire * * * As Adopted By The Council of Censors* 36 (Printed by Francis Bailey, Phila., 1784). The Committee, quoting Locke, expressed the opinion "that the legislative cannot assume to itself, a power to rule by extemporary and arbitrary decrees," but rather must "decide the rights of the subject by *promulgated*

standing laws, and known authorized judges" (*id.* at 37; emphasis in original). After examining past practices, the Committee concluded that the "practice of entering into personal discussions, and hasty votes, too often in contradiction to express laws, solemnly enacted," had "been too much countenanced" (*ibid.*). The legislative veto device raises precisely these concerns.

It also is significant to note that in a separate report adopted by the Council of Censors in 1784, the Council criticized violations of a provision in Section 20 of the Pennsylvania Constitution of 1776 which provided—in terms identical to Article II, Section 3 of the Federal Constitution—that the Executive "shall take care that the laws be faithfully executed." The Committee objected that the Executive Branch had "yielded executive power to the legislative" by conferring with the General Assembly through its committees concerning the prosecution and settlement of matters for which the Executive had been vested by law with responsibility. The Council of Censors observed that "a resolve of the House could not add thereto," and that with respect to the settlement of accounts, "the Assembly had nothing to do with them, nor without passing a law could intermeddle." *Report of the Committee of the Council of Censors* * * * *On The Executive Branch of Government* * * * *As Adopted By The Said Council* 8-9 (Printed by Francis Bailey, Phila., 1784). Surely, the Council of Censors would not have found this practice of "intermeddl[ing]" by the Assembly short of "passing a law" consistent with the Executive's constitutional duty to take care that the laws be faithfully executed if only the Assembly had passed a law authorizing that practice.

Finally, the remark of Gouvernor Morris during the debates on the Presidential veto, cited by the Senate (Sen. Supp. Br. 7), was a reference to the Council's report on what Morris termed "the many invasions of the legislative department on the Executive" (2 M. Farrand, *supra*, at 299), and Morris suggested that the

President have an *absolute* negative over the actions of the Legislature to strengthen the Executive's check against such incursions (*id.* at 299-300). Against the background of the Council of Censors' concerns, Morris' remarks underscore that the President's veto power cannot be avoided in the manner the Senate and House of Representatives suggest.[6]

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[6] The House of Representatives once again seeks to justify the vesting of disapproval authority in one House of Congress by contending that under Section 244(c)(2) an alien simply appeals to Congress, through the Attorney General, for a legislative "act of grace" permitting him to obtain permanent resident status. House Supp. Br. 4-5, 9, 23-24. As we have previously explained (INS Br. 40-43), this characterization is both inaccurate and irrelevant. As the American Bar Association aptly puts it in its amicus brief (at 21): "Legislative mercy, like legislative justice, or for that matter legislative severity, must be meted out by legislation."

The extravagance of the House's assertions regarding Congress' power to perform "acts of grace" in any manner it chooses also calls to mind Blackstone's fears, quoted by the court of appeals, about the power of a single magistrate to enact tyrannical laws and execute them in a tyrannical manner, "since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself" (J.S. App. 31a, quoting 1 W. Blackstone, *Commentaries* 146-147 (1979)). These concerns apply equally where the Legislature chooses to designate itself or one of its Houses as the "dispenser of justice," unchecked by the Executive.

The ABA's observation also is the complete answer to the House of Representatives' pervasive contention that with respect to the admissibilty of aliens, as with other "public rights," Congress may reserve that power to itself or may delegate it to Executive or Judicial tribunals. See generally House Supp. Br. 10-22, 24-29. We do not dispute that Congress may reserve its Article I powers over aliens rather than assign those functions to the Executive or Judicial Branches. But when Congress chooses to exercise the power it has reserved, by providing for the admission, expulsion, or permanent residence of an alien or class of aliens, it must do so in the same manner in which it exercises any of its legislative powers—through the enactment of a law or other measure that has received the concurrence of both Houses and been presented to the President. Once enacted into law, that exercise of legislative power must be executed by the Executive, not by Congress, as is made clear by the decisions of this Court concerning the power of Congress over aliens. See INS Br. 46-47.

2.a The Senate devotes most of its Supplemental Brief (at 9-40) to a discussion of the inclusion of legislative veto provisions in various statutes beginning in 1932. This discussion has no relevance to this case, however, for it does not offer any basis for concluding that the legislative veto device is constitutional.

The mere fact that Congress has chosen to enact legislative veto provisions obviously does not render them constitutional, because "[p]ast practice does not, by itself, create power" (*Dames & Moore* v. *Regan*, 453 U.S. 654, 686 (1981)). Indeed, the increasing frequency of such enactments over the last decade and the pendency of even more far-reaching bills that would comprehensively subject all administrative rules to a legislative veto (see Sen. Supp. Br. 37-38) serve to underscore that a decision by this Court sustaining the constitutionality of Section 244(c)(2) would pose a substantial threat to the independence of the Executive Branch, the doctrine of separation of powers, and the efficacy of the Constitutional checks on improvident legislative action.

b. Nor does this case even remotely resemble *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 473 (1915), cited by the Senate (Sen. Supp. Br. 10-11 & n.15). There the Court relied upon a consistent and longstanding Executive practice, known to and acquiesced in by Congress, in concluding that the Executive action there at issue was authorized. See also *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 686. In the present case, there has been a longstanding history of *disagreement* between the Executive and Legislative Branches, and even within the Legislative Branch itself, regarding the constitutionality of the legislative veto. The Senate's attempt to create the contrary impression is seriously misleading.

In 1920, President Wilson vetoed a bill bestowing significant powers on a congressional joint committee to override actions of the Executive on the ground that it violated the doctrine of separation of powers (59 Cong. Rec. 7026-7027 (1920)), and he likewise vetoed the Budget Act of 1920, which authorized the removal of the Comp-

troller General by concurrent resolution of Congress (*id.* at 8609). As the Subcommittee on Separation of Powers of the Senate Judiciary Committee observed in 1969 after reviewing the relevant history, "[e]ver since the administration of President Wilson, disputes have arisen between Congress and the President regarding attempts by Congress to insert legislative veto provisions in statutes." S. Rep. No. 91-549, 91st Cong., 1st Sess. 14 (1969).

Thus, although, as the Senate notes, President Hoover initially suggested and subsequently signed legislation providing that one House of Congress be given an opportunity to veto reorganization plans proposed by the President (Sen. Supp. Br. 11 & nn.17 and 18), he later vetoed a bill containing a committee veto provision on the strength of an opinion of the Attorney General which expressed the view that there was a "grave question" about the constitutionality of the legislative veto provision in the reorganization statute. 76 Cong. Rec. 2445 (1933); 37 Op. Att'y Gen. 56, 63-64 (1933). Largely because of the Attorney General's opinion, the reorganization authority reenacted in 1933 did not contain a legislative veto provision. See Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1012-1013 (1975); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 577 (1953); 76 Cong. Rec. 3537-3544, 4610-4614 (1933).

President Roosevelt subsequently sought renewal of reorganization authority without the legislative veto provision, contending that Congress could not invalidate the President's action by a mere resolution (83 Cong. Rec. 4487 (1938)), although he later receded from his resistance to the legislative veto in the reorganization context in the face of political realities.[7] Even so, as the Senate

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[7] See generally L. Fisher & R. Moe, *Delegating with Ambivalence: The Legislative Veto and Reorganization Authority*, in Congressional Research Service, U.S. Library of Congress, 96th Cong., 2d Sess., *Studies on the Legislative Veto* 165, 187-194 (House Rules Comm. Print 1980).

concedes (Sen. Supp. Br. 13 & n.24), the congressional debates reflected a deep division within the Congress on the constitutionality of the legislative veto device. See Ginnane, *supra*, 66 Harv. L. Rev. at 578-581. President Roosevelt also signed into law provisions in various statutes passed immediately before and during World War II providing for the termination of powers by concurrent resolution. Sen. Supp. Br. 15-16. But it is clear that President Roosevelt's approval of these war time measures did not reflect the view that they were constitutional. See Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1357-1358 (1953).

Subsequent Presidents also repeatedly and publicly expressed the view that congressional veto provisions are unconstitutional. It is true, as the Senate points out (Sen. Supp. Br. 18 & n.39), that these views were expressed in connection with bills that provided for vetoes of or other manner of control over administrative action by congressional committees, but this reflects nothing more than the fact that this was the form of legislative veto device Congress had included in the bills involved. The Senate fails to note that the basis of the President's opposition was almost invariably that such measures are inconsistent with the constitutional doctrine of separation of powers by allowing congressional participation in the execution of the laws [8]—a legal position that applies equally to legislative vetoes by one or both Houses as well as by committees. Thus, the Senate is simply wrong in intimating (Sen. Supp. Br. 18-19, 24) that Presidents during this period had uniformly accepted the constitutionality of the one-House or two-House legislative veto.

Moreover, as the Senate concedes (Sen. Supp. Br. 24-25, 30, 37), Presidents Nixon, Ford and Carter all took the

[8] See 97 Cong. Rec. 5374-5375 (1951) (Pres. Truman); 98 Cong. Rec. 9756 (1952) (Pres. Truman); 100 Cong. Rec. 7135 (1954) (Pres. Eisenhower); 101 Cong. Rec. 10460 (1955) (Pres. Eisenhower); 102 Cong. Rec. 12959 (1956) (Pres. Eisenhower); Pub. Papers 648-650 (1956) (Pres. Eisenhower); Pub. Papers 6 (1963) (Pres. Kennedy); Pub. Papers 861-862, 1249-1251 (1964) (Pres. Johnson); 1 Weekly Comp. Pres. Doc. 132, 432, 433 (1966) (Pres. Johnson); 111 Cong. Rec. 12639-12640 (1965) (Pres. Johnson).

position that statutes providing for one or both Houses of Congress to overturn Executive action by the passage of a resolution were unconstitutional. Indeed, President Carter sent a formal message to Congress on the subject, in light of the increasing frequency with which such measures had been enacted. Pub. Papers 1146 (1978).[9]

The history of the legislative veto device therefore is essentially one of disagreement between the Legislative and Executive Branches, and even within the Legislative Branch itself, on the constitutional question.[10] This di-

[9] Despite President Carter's firm statement, the Senate twice attempts to convey the misleading impression that President Carter, in his special message, characterized the legislative veto provisions in the War Powers Resolution, 50 U.S.C. 1544(c), and the Impoundment Control Act of 1974, 31 U.S.C. 1403(b), as "constructive safeguards." See Sen. Supp. Br. 25 n.55, 27 & n.62. That is not what President Carter said. The message took the position that legislative vetoes are unconstitutional. In the passage quoted by the Senate, President Carter simply observed that the desire for the legislative veto stems in part from Congress' mistrust of the Executive, due to abuses of years past, and that Congress responded to those abuses by enacting "constructive safeguards" in such areas as war powers and the budget process. Pub. Papers 1149 (1978). He did not state that the legislative veto provisions of the war power and impoundment statutes were "constructive," much less constitutional. Indeed, in the very next sentence, he reiterated that the legislative veto "is an overreaction which increases conflict between the branches of government." *Ibid.*

Similarly, the Senate's statement (Sen. Supp. Br. 30-31) that President Carter "accepted" certain legislative vetoes relies only on a response to a question at a news conference about the House of Representatives' recent insertion of such a provision in a pending gas rationing bill (15 Weekly Comp. Pres. Doc. 1311 (1979)) and reflects nothing more than the political realities that occasionally have confronted Presidents when Congress has insisted on legislative veto provisions. The comment does not reflect the view that such measures are constitutional.

[10] Contrary to intimations in the Senate's Supplemental Brief, legal memoranda prepared by several agency officials over the years do not support the Senate's broad assertion of the constitutionality of legislative vetoes generally or an expression by the Executive to that effect. The Senate first cites (Sen. Supp. Br. 16 n.33) a 1941 statement prepared by the General Counsel of the Office of Price Administration supporting the constitutionality of the provision

vision is manifest in this case. The Executive Branch takes the firm position that the legislative veto device is unconstitutional, and a number of Members of the House

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in a pending bill permitting Congress, by concurrent resolution, to terminate the price control authorization. *Price Control Bill: Hearings on H.R. 5479 before the House Comm. on Banking and Currency*, 77th Cong., 1st Sess. 983 (1941). Previously in the hearings, however, the General Counsel had confessed that his "ignorance on the subject of the validity of a concurrent resolution is complete." *Id.* at 400. Moreover, the statement he subsequently furnished the committee was guarded and narrowly limited to the situation in which Congress simply acts as a finder of fact for the termination of previously granted authority, rather than declaring legislative policy. He stressed that giving legal effect to a concurrent resolution expressing legislative policy would deny the President the opportunity to review that policy. *Id.* at 983-984. Moreover, even as confined to the validity of the provision for termination of authority by concurrent resolution based on a congressional finding of fact, the General Counsel's views were inconsistent with those of President Roosevelt, who viewed such resolutions as an unconstitutional means of repealing legislation. See Jackson, *supra*, 66 Harv. L. Rev. at 1358.

The 1949 memorandum of the Department of Justice, also cited by the Senate (Sen. Supp. Br. 17-18), concerned the narrow issue of reorganization authority, and it characterized the legislative veto provision as in the nature of a contract between the President and Congress under which the President personally undertook to put no reorganization plan into effect if Congress expressed its disapproval. S. Rep. No. 232, 81st Cong., 1st Sess. 20 (1949); see Watson, *supra*, 63 Calif. L. Rev. at 1014 n.143. That reasoning, which is seriously flawed as a constitutional matter, plainly has no application where, as here, the rights of private parties are directly implicated by the veto. The testimony of Assistant Attorney General Wozencraft, cited by the Senate (Sen. Supp. Br. 20 n.43), likewise was limited to legislative vetoes in the reorganization context and did not suggest that such vetoes would be constitutional in other settings. See also 43 Op. Att'y Gen. No. 10 (Jan. 31, 1977); INS Br. 58 n.37.

The memorandum by the General Counsel of the Department of Agriculture in 1966, cited by the Senate (Sen. Supp. Br. 20 n.42), concerned a provision for the submission to Congress of programs for the marketing of commodities. The memorandum's discussion of the constitutionality of the legislative veto was limited. It first quoted a paragraph from the House Report on the 1939 Reorganization Act. It then stated a two-sentence conclusion that (i) the veto

of Representatives who are Subcommittee Chairmen have filed a brief as amici curiae in this case agreeing with the Executive's position that such provisions are unconstitutional. See Br. for Rep. Philip Burton, et al.; see also H.R. Rep. No. 97-809 (Pt. II), 97th Cong., 2d Sess. 12-18 (1982).

c. The Senate also asserts (Sen. Supp. Br. 9-10), on the basis of the history of Congress' insertion of legislative veto provisions in statutes, that the function of the legislative veto device has been to preserve the balance between the elected Branches. This assertion is clearly in error, for the legislative veto device is manifestly inconsistent with the balance the Framers struck between the two Branches.

Nor, contrary to the Senate's contention (Sen. Supp. Br. 9-10), can the legislative veto device be justified, and the carefully crafted constitutional protections ignored, simply because Congress may on occasion be ambivalent about vesting broad authority in the Executive. The Framers were aware of the need that might arise to terminate authority if Congress concludes that it has been unwisely conferred and of the tension between preserving Legislative prerogatives and ensuring needed Executive flexibility. During the debates in the Constitutional Convention on the President's veto power, concern was expressed that if three-fourths of each House were

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was supported by cases sustaining Acts of Congress making the application of provisions in agricultural statutes subject to producer referenda (*e.g.*, *Currin* v. *Wallace*, 306 U.S. 1 (1939)), and (ii) the President's veto power was not bypassed because he was to submit the plans to Congress. *Legislative Policy of the Bureau of the Budget: Hearings Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 89th Cong., 2d Sess. 31-32 (1966). This opinion hardly represents a considered legal judgment on the question, and there is no indication that the President or Attorney General concurred in it. We have answered in our principal brief (INS Br. 55-56 & n.36) the argument that *Currin* v. *Wallace* supports a provision for Congress to veto Executive action under a duly enacted law: Congress cannot attach an unconstitutional condition to the assignment of authority to the Executive. See also Ginnane, *supra*, 66 Harv. L. Rev. at 595.

required to override a Presidential veto, "the repeal of bad laws might be rendered too difficult" (2 M. Farrand, *supra*, at 586 (remarks of Mr. Williamson); see also *ibid.* (remarks of Col. Mason)). There was no suggestion in response that this difficulty could be avoided simply by providing in the law itself that its effect could be terminated or its application to particular situations negated by action of Congress that would avoid altogether the possibility of a Presidential veto.[11] Rather, Madison responded to this concern by stating: "As to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take place of limiting the duration of laws so as to require renewal instead of repeal" (*id.* at 587).

Madison's response applies equally to the Senate's assertions in this case: in "doubtful cases" where Congress is uncertain about the wisdom of enacting particular legislation, it may limit the duration of the authority granted in order to ensure that Congress can take a fresh look at the legislative policy in light of experience under it and change that policy without the need to override a Presidential veto if the President does not agree that it should be changed.

Indeed, the Constitution itself contains a model for this approach, providing that no appropriation to raise and support armies "shall be for a longer Term than two Years." Article I, Section 8, Clause 11. This provision was viewed as establishing a necessary accommodation between the need to preserve Legislative accountability for military efforts, and thereby to limit Executive power in this area, with the need to preserve flexibility to meet unforeseen contingencies. See, *e.g.*, *The Federalist* No. 24, at 158 (A. Hamilton) (Rossiter ed. 1961); *The Federalist* No. 26, *supra*, at 171-174 (A. Hamilton); *The Federalist* No. 41, *supra*, at 256-260 (J. Madison). Any suggestion that the system of checks and balances in the

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[11] Indeed, Gouvernor Morris expressed the view that making repeal too easy would cause "instability" and that experiments in public policy that are initially unpopular should be given an opportunity to prove their worth. 2 M. Farrand, *supra*, at 586.

Constitution must give way because of practicalities not foreseen by the Framers therefore is without merit.

Moreover, as the American Bar Association explains in its amicus brief (Br. 9-15), there are substantial grounds for concluding that the legislative veto device, even if it were consistent with the Constitution, is not a useful means of addressing the problems of delegation of authority by Congress identified by the Senate. Indeed, the device may often prove counterproductive, because it may interfere with the regularity of administrative and legislative procedures and actually encourage broad and unwise delegations of authority by Congress in the first instance, thereby undermining the Senate's professed goal of preserving political accountability for administrative action. See generally ABA Br. 9-15, and materials cited; Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977); McGowan, *Congress, Court, and Control of Delegated Powers*, 77 Colum. L. Rev. 1119, 1145-1148 (1977); H.R. No. 97-809, *supra*, at 12, 18; Subcomm. on Rules of the House Comm. on Rules, 97th Cong., 1st Sess., *Background Information on Regulatory and Congressional Review of Agency Rules* 16-19 (Comm. Print 1981). But even if there were a consensus that the legislative veto is a sound means to bring order and accountability to the Federal Government, the implementation of this fundamental change in our system of government would require an amendment of the constitutional provisions that unambiguously foreclose such a combining of powers in the Legislative Branch and circumvention of the Presidential veto power.

For the foregoing reasons and the additional reasons stated in our principal brief, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

REX E. LEE
Solicitor General

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